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October 18, 2022

Re: *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, Case No. 1:13-cv-07789-LGS

Dear Judge Schofield,

Following up on today's charge conference, the Credit Suisse Defendants respectfully request a balancing instruction, set forth below, before the final paragraph of the Court's instruction on Single or Multiple Conspiracies.

The Court will instruct the jury on the concept of *respondeat superior*, specifically that “[t]hrough its employees, ... an entity is capable of conspiring with other persons or other entities.” In addition, the verdict sheet, at question 4B, will ask the jury to identify “every bank” that participated in the conspiracy they find.

Accordingly, if the jury concludes that a Credit Suisse trader conspired in a chatroom with one trader from, for example, Bank of America (BofA), they will mark BofA as a co-conspirator in response to question 4B. However, as the charge and verdict sheet are currently drafted, if the jury then finds that a *separate trader* at BofA was involved in multiple other, unrelated agreements with other traders at other banks, Credit Suisse could be found to have conspired with those other banks as well, despite the lack of evidence to support such a finding.

To avoid this risk, the defense respectfully requests an instruction to the following effect, just before the final paragraph in the Single or Multiple Conspiracies section:

In addition, the fact you find one of a bank's employees is part of a conspiracy, does not necessarily mean that all of the bank's employees are conspirators, or part of the same conspiracy.

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*See AD/SAT, Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 234 (2d Cir. 1999) (“[A]lthough the nature of trade associations is such that they are frequently the object of antitrust scrutiny, every action by a trade association is not concerted action by the association’s members. . . . [A]n antitrust plaintiff must present evidence tending to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective.” (citation omitted)); Thomas V. Vakerics, *Antitrust Basics* § 6.10 (“In situations where a trade association, its officers, employees or members are found to have violated the antitrust laws, membership in the association will not automatically involve all members in the violation. There must, instead, be some evidence of actual knowledge of, and participation in, the illegal scheme in order to establish a violation of the antitrust laws by a particular association member.”) (cited with approval in *AD/SAT*, 181 F. 3d at 234).

Respectfully submitted,

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Honorable Lorna G. Schofield  
United States District Judge

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Via ECF